Canada Law Journal.

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DIARY FOR JUNE.

1. Fri.... Parliament first met at Toronto, 1797.
2. Sat.... Fenian attack, 1866.
3. Sun.... *Second Sunday after Trinity.*
8. Fri.... First Meeting of Parliament at Ottawa, 1866.
9. Sat.... Easter sittings end.
10. Sun.... *Third Sunday after Trinity.*
11. Mon.... County Court term for York begins.
12. Tue.... County Court sitt. (except York) begin.
15. Fri.... Magna Charta signed, 1215.
17. Sun.... *Fourth Sunday after Trinity.* Burton and Patterson, JJ. Ct. of Appeal, sworn in, 1874.
18. Mon.... Earl Dalhousie, Gov.-General, 1820. Battle of Waterloo, 1815.
20. Wed.... Accession of Queen Victoria, 1837.
21. Thurs.... Galt, J., sworn in C. P., 1869. Longest day.
23. Sat.... Hudson Bay Co. Territory transferred to Dom. 1870
24. Sun.... *Fifth Sunday after Trinity.*
28. Thurs.... Queen Victoria crowned, 1837.
30. Sat.... Hon. J. B. Robinson, Lieut.-Gov. of Ont., 1880.

TORONTO, JUNE 1, 1883.

MR. JOHN WINCHESTER having resigned the position of Registrar of the Queen's Bench, has been appointed Inspector of the offices of sheriffs and local masters under the Judicature Act. Mr. J. S. Cartwright, who formerly did the work of the Surrogate office in the County of York, takes his place; whilst Mr. Gordon Brown succeeds to the office formerly held by Hon. Wm. Cayley.

As it is probable that Lord Coleridge will be in Canada after vacation, the Benchers have appointed a committee of their number to confer with the Bar as to a Bar dinner on the occasion of the visit of this distinguished judge. We have no doubt that arrangements will be made in accordance with the traditions of Osgoode Hall, whose entertainments have been marked with good taste, and dispensed with no niggard hand.

WE receive occasionally a bundle of the Australian *Law Times*, published at Melbourne, naturally rather stale before they reach us, and rather more so than there would seem any necessity for. In some of them is discussed the propriety of an amalgamation of the two branches of the legal profession. Things seem to be tending in that direction, and in several of the Australian Colonies a change to the system in vogue on this Continent has already taken place.

THE *American Law Review*, one of the leading organs of professional opinion in the United States, in speaking of the "intemperate attack" made by a cotemporary on the Supreme Court of Canada, on account of the criticism of that court on a judgment of the Queen's Bench of Quebec, says:—"The *Law Journal* justly points out that the criticism was entirely proper. It is hard to see how any lawyer could have any doubt on the point." With reference to our undenied charge that the strictures upon the Supreme Court in the *Legal News*, were written by a judge of the court appealed from, the *Review* says:—"It is to be hoped, for the sake of decency, that this charge will prove to be untrue."

RECENT personal experience enables us to vouch for the truth of the saying that "a spark neglected makes a mighty fire." We are sure, under the circumstances of a fire having occurred in our publisher's establishment, our readers will pardon delays. A printer's office is never a tidy place, but its appearance after partial destruction by fire is quite too hideous for description; especially to an editor who has wandered through the *debris*

with an attendant demon vainly endeavouring to piece together the charred remains of half-set copy and half-pied type; and who has had his feelings further lacerated by the true but quite unnecessary remark by the printer, that though he promised "proof," he did not guarantee it "fire-proof."

For reasons upon which we need not further enlarge we are late with this issue, and must combine the number due in the middle of the month with that of July 1st, which will be issued in good season.

RESTITUTION OF STOLEN PROPERTY.

In *Chichester* v. *Hill*, 48 L. T. N. S. 364, an important point affecting the construction of the Imperial Statute 24-25 Vict. c. 96, s. 100, (from which the Canadian Statute 32-33 Vict. c. 21, s. 113, is mainly taken), was recently decided by the English Q. B. Divisional Court, composed of Field and Williams, JJ., and it seems strange that although the Imperial Act has now been in force over twenty years the point decided seems never before to have come up for adjudication. The section of the statute referred to provides that on the conviction of any person for stealing, taking, etc., or knowingly receiving any chattel, money, valuable security, or other property whatsoever, the property shall be restored to the owner; and it goes on to provide that the court may make an order for the restitution of the property to the owner; provided, that if it shall appear before any such order for restitution is made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bona fide* taken, or received, by transfer or delivery by some person, or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by felony or misdemeanour, been stolen, taken, etc., in such case the court shall not award or order the restitution of the security. The question for the court was whether a stolen negotiable instrument which gets into the hands of a *bona fide* holder for value, without notice of the theft, can, on conviction of the thief, be recovered by the original owner from the transferee in a civil action, and it was held by the court that the proviso in the Act not only prevented the court from making any summary order for restitution in such a case, but also protected the transferee from any liability to the original owner in any civil action. It was argued for the plaintiff that the beginning of the section providing that "the property shall be restored to the owner," applied to all kinds of property, and that the concluding words merely restricted the right to a summary order for restitution, but the court very reasonably considered that the proviso would be insensible if it merely protected the *bona fide* transferee from an order for restitution, etc., yet left him liable to an action to which he could have no defence. The case reveals the somewhat curious fact that an Act of Parliament has been construed judicially, contrary to the opinions of all the judges as to its meaning at the time it was passed. At common law the property in stolen goods was not altered by larceny *per se*, but it was liable to be divested by a subsequent sale in market overt, and Williams, J., says that he finds that it was the opinion of all the judges, when the 21 Henry VIII. c. 11, was passed, that that statute, which authorized the restitution of stolen property upon conviction of the thief, was not intended to affect the title acquired by a purchaser in market overt. But it seems a practice sprang up, at the Old Bailey, of disregarding that title, and the practice became too inveterate to be disregarded by the judges, and it was laid down by the judges, in *Harwood* v. *Smith*, 2 Durn. & E. 750, (although the *dicta* on this point were not necessary for the decision of that

case), that on the conviction of the thief the property in the stolen goods revested in the owner, though the goods may have passed in the meantime into the hands of an innocent purchaser in market overt. In *Hill* v. *Chichester* the court seemed to incline to the opinion that this was still the law, and that a sale of stolen chattels, not being negotiable instruments, even in market overt, will not divest the property of the person from whom they have been stolen. The case of *Cundy* v. *Lindsay*, L. R. 3 App. Cas. 459, however, does not appear to have been brought to the attention of the Court, and although the *dictum* of Lord Cairns in that case to which we intend to refer was not necessary for the decision, yet coming as it does from so eminent a member of the ultimate Court of Appeal it appears to be sufficient to warrant the belief that the *dicta* in *Harwood* v. *Smith* would not now be regarded as a correct statement of the law. In *Cundy* v. *Lindsay* Lord Cairns laid down the law on this point as follows :—"With regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If *he purchases the chattel in market overt he obtains a title which is good against all the world;* but if he does not purchase the chattel in market overt, and it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a good title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title." Even before the Canadian Statute, it had been held in Ontario that the *bona fide* transferee for value of a stolen negotiable instrument, acquired a good title thereto as against the owner from whom it had been stolen : *Trust and Loan Company* v. *City of Hamilton*, 7 C. P. 98.

The result of the matter therefore would seem to be that, so far as stolen negotiable instruments are concerned, a *bona fide* transferee thereof for value may acquire a good title as against the person from whom they may have been stolen ; as regards other stolen chattels it is also possible that a *bona fide* purchaser in market overt may also acquire a good title as against the person from whom they have been stolen ; but this, in the present state of the law, seems to be a doubtful point; but it seems to be clear that the acquisition of stolen chattels (not being negotiable instruments) in any other way than by purchase in market overt, will not divest the property of the person from whom they have been stolen : *Bowman* v. *Yielding*, Robinson & Jos. Dig. 3676.

We may before leaving the subject, notice that in Clarke and Sheppard's Criminal Law, at p. 248, the learned authors have assumed that the English and Canadian Acts are identical, and that restitution can only be ordered upon a conviction taking place, but the Canadian Act is really more extensive than the English Act in this respect, and enables the court to order restitution upon a trial for felony or misdemeanour, although the person tried for the felony or misdemeanour be not convicted, where the jury finds the property in question to be the property of the prosecutor, or even of any witness. *Regina* v. *The Lord Mayor of London*, L. R. 4 Q. B. 371, referred to by Messrs. Clarke and Sheppard, cannot therefore be said to be an authority for the construction of the Canadian Act.

The right to restitution of goods alleged to be stolen, has been still further extended by the Provincial Act, 45 Vict. c. 12, which enables the court to order restitution of property alleged to have been stolen, which is found in the possession of a person afterwards convicted of stealing, embezzling, or receiving other property, where the Crown does not intend to proceed upon any charge in respect of the property of which restitution is claimed.

RECENT ENGLISH DECISIONS.

The May number of the Law Reports consist of 10 Q. B. D. 353-477; 8 P. D. 21-101; and 22 Ch. D. 675-842.

In the first of these there are not many cases having any direct application here. *Burdick* v. *Sewell*, p. 363, however, to use the words of the learned judge who decided it, "raises a difficult and important question as to the effect of the Bills of Lading Act, Imp. 18-19 Vict. c. 111, (R. S. O. c. 116, sect. 5), in transferring liability to freight from the shippers to the indorsee of a bill of lading.

BILLS OF LADING—PLEDGEE—R. S. O. C. 116, S. 5.

In this case Field, J., decides that the shipper of goods does not, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, "pass the property" in the goods to such indorsee so as to make him directly liable to the ship-owner of freight under the above enactment; in other words, it is not correct to say that the necessary legal implication from, or the effect of an indorsement of a bill of lading for an advance, is that by it the whole and entire legal property passes. After briefly reviewing the different modes in which advances against deposit of goods are made, he said the question resolved itself into whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge. "If the former, the whole and entire property would pass, and as a consequence the liability to freight would be transferred to the defendants; . . . if the latter took the security of a contract by which 'the property pass d' to them, they cannot take the good and reject the bad. On the other hand, if the contract, although carried out by the indorsement of the bill of lading, remained merely a pledge, I think it clear that "the property" as expressed by the Act, did not pass, for by these words I understand the whole and entire legal property, and not merely the limited interest which is transferred by the contract of pledge." And after referring to the cases on the subject, especially *Glyn, Mills & Co.* v. *East and West India Docks Co.* L. R. 6 Q. B. D. 480, and *Lickbarrow* v. *Mason*, 1 Sm. L. C. 7th ed. 756, he arrives at the conclusion that as between the immediate parties the intention must prevail, and in the present case he held, upon the facts, that the parties did not intend anything more than a pledge.

BUILDING CONTRACT CERTIFICATE OF SURVEYOR CONCLUSIVE.

The next case requiring notice is *Richards* v. *May*, p. 400. There A. contracted to build a house for B., and the 4th clause of the contract provided that all extras or additions, payment for which the contractor should become entitled to under the said conditions, should be paid or allowed for at the price which should be fixed by the surveyor appointed by B. Cave, J., held that this provision impliedly gave power to the surveyors to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive.

LEX LOCI—LEX FORI.

The next case, *Adams* v. *Clutterbuck*, p. 403, illustrates the distinction between *lex fori* and *lex loci*. The main question was whether the provision of the law of England, that a right of shooting can only be conveyed by an instrument under seal, is part of the *lex loci* or *lex fori*? Cave, J., in deciding it, says:—"The provision regulates and was intended to regulate the transfer of interest in land, and unless there is compliance with the provision the grantee takes no legal estate by the grant quite irrespective of whether he is seeking to enforce the claim in a court of justice or not. I cannot doubt that the provision is therefore a part of the *lex loci* and not of the *lex fori* . . . There is no proposition of law to be found, so far as I know, in any book to the contrary. *Leroux* v. *Brown*, 12 C. P. 801, turns on the provisions of the Sta-

tute of Frauds, the very language of which indicates that it is part of the *lex fori* and not of the *lex loci.*

LEASE—ENJOYMENT UNDER IMPERFECT LEASE.

This case also elicited the following observations from Cave, J., which are worthy of note:—"I can find no case in which a man who had entered into a contract to do something on property on the expiration of a term of years has been held free from liability because, although he had actually enjoyed the property, he had not acquired a vested right in the term by the instrument under which he enjoyed it . . . Of course if the lease or the term actually contracted for was never enjoyed, and there had been a failure of consideration for the promise, it would be otherwise. But if the lease has actually been enjoyed, it seems to me that justice requires that the lessee should perform that which he agreed to perform."

DEMURRER—STATEMENT OF CLAIM SHOWING FELONY.

The case of *Roope* v. *D'Avigdor*, p. 412, decides that a statement of claim is not demurrable on the ground that it shows the cause of action to be a felony for which the felon has not been prosecuted. Cave, J., says:—"Whatever may be the proper mode of suspending an action or of raising an impediment to it on the ground that it is brought in respect of a felony, and that the felon has not been prosecuted, the proper mode of doing so is not, in my opinion, by demurrer."

CHARTER-PARTY—"AT MERCHANT'S RISK."

In *Burton* v. *English*, p. 426, which is also a decision of Cave, J., it is held that where it was stipulated in a charter-party that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk," the words "at merchant's risk" excluded any right on the part of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterer and jettisoned. It was vainly contended, in opposition to this, that the words "at merchant's risk" had reference solely to the liability of the ship-owner as carrier, and did not apply to a claim for general average contribution, which is not a risk to which the ship-owner is exposed as carrier, but one to which he is exposed as owner of the ship in common with the owners of the cargo.

INFANT—RIGHT TO CUSTODY OF ILLEGITIMATE CHILD.

In the *Queen* v. *Nash*, p. 454, the Court of Appeal enforced the natural right of a mother of an illegitimate child to its custody. Jessel, M.R., says:—"In a reported case, Maule, J., a very eminent judge, is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed to think that this was said ironically—but if not, the judge, in making the observation, must have been referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child . . . The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child."

In 8 P. D. 21-101, the great majority of cases are admiralty cases, and none of them seem sufficiently applicable to law in this country to need notice. It may be mentioned that among them is the case of *Dean and others* v. *Green*, wherein the contumacious rector of Miles Platting was at length awarded a writ of deliverance on the ground that, much against his will, he had, during his imprisonment, "obeyed" the order of the Court to abstain from the ministration of his sacred office. In the May number of the Chancery Division the first case is *Great Western Ry. Co.* v. *Swindon, etc. R. Co.* p. 677.

Recent English Decisions.

STATUTORY CONSTRUCTION—SPECIAL RAILWAY ACTS.

This is concerned with the interpretation of the special Act of the defendant company, and does not seem to illustrate any general principle of law, or to require any notice here further than as regards the words of Bowen, L. J., at p. 713, which it may be useful to call attention to. He says:—"It seems to me that the greatest injustice might be done if general rules of construction, which are useful enough for interpreting General Acts of Parliament drawn with great care, were rigorously applied to clauses stuck into a railway bill at the last moment when the bill is before a committee. We must not close our eyes to the well known course of proceeding in these matters. These sections in Railway Acts, as every one knows perfectly well, are often drawn by business men or their counsel at a moment's notice, and must not be read as if they were carefully framed clauses deliberately drawn by a conveyancer."

TRUSTEE—LOSS OF TRUST FUND—NEGLIGENCE.

The case of *In re Speight*, *Speight* v. *Gaunt*, p. 727, illustrates the duties and liabilities of trustee in dealing with the trust estates. The facts, put briefly, were, that a trustee, acting perfectly *bona fide*, and wishing to invest trust moneys on certain corporation debentures, as he was empowered to do, employed a broker to purchase the debentures. On the broker bringing him a bought note, and asking for the money, he handed it over to the broker in accordanee with what appeared on the evidence to be the usual custom. The broker, as a matter of fact, never bought the securities, but shortly after became insolvent, and made off with the money. The question was, whether the trustee was liable to make good the loss. The Court of Appeal, reversing Bacon, V. C., held that he was not. Certain passages may be quoted from their judgments in which they enunciate the principles of law governing such cases. Thus Jessel, M. R., says:—It seems to me, on general principles, a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, the trustee is not bound because he is a trustee, to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own . . If a trustee has made a proper selection of a broker, and has paid him the money on the bought note, and, by reason of the default of the broker the money is lost, it does not appear to me, in that case, the trustee can be liable." Later on, at p. 746, he says:—"My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words you are not to exercise your ingenuity for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him." Again, Bowen, L. J., says:—"Now, with regard to the law, it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own . . . A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man, he cannot throw upon the shoulders of somebody else that which has been placed upon his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything himself, he must, to a certain extent, make use of the arms, legs, eyes, and hands of other persons, and the limit within which, it seems to me, he is confined, has been described

throughout, both in the cases which have been referred to and the judgments which have preceded me, to be this—a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so."

EXECUTOR—DEVASTAVIT—STATUTE OF LIMITATIONS.

Passing by a number of cases under the bankruptcy law, *In re Gale*, *Blake* v. *Gale*, p. 820, is reached of which it needs only be said that it illustrates the rule that a demand against executors, in respect of a devastavit, is barred after a lapse of six years.

SHARES—BLANK TRANSFER - PLEDGE.

The next case requiring mention is *Francis* v. *Clark*, p. 830. There the registered holder of shares in a company, whose articles of association did not require that a transfer of shares should be made by deed, deposited the certificates of his shares, accompanied by a transfer executed by himself, but with the name of the transferee and the date of the execution left in blank, with a person who advanced him money as security for the loan. No time was fixed for the repayment of the loan, and nothing was said as to the object of the transfer. Fry, J., held the depositee had no authority, without a previous demand for repayment of the loan, to sell or sub-mortgage the shares, and fill in the name of the purchaser or sub-mortgagee as transferee. In his judgment he says :—"On principle I am unable to see why the deposit should confer a power of sale. As a general rule the pawnee of chattels has no right to sell them unless a time was originally fixed for their redemption, and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due to him. The law is thus laid down by Mr. Justice Story in his book on the Law of Bailments, (7th ed. plac. 308) :—"If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold. I can see no reason why the principle which applies to a pledge of physical chattels should not equally apply to a pledge of a chose in action."

CONTRACT AS TO CHATTELS—SPECIFIC PERFORMANCE—INJUNCTION.

The last case to be noticed is *Donnell* v. *Bennett*, p. 855. In this case there was a contract for the sale of chattels to the plaintiff, containing an express negative stipulation not to sell to any other manufacturer, and the court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. Fry, J., says :—"It appears to me that the tendency of recent decisions is toward this view —that the court ought to look at what is the nature of the contract between the parties; that if the contract, as a whole, is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that, in my judgment, that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me." And after referring to some of the cases, he says : "That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract." This concludes the May numbers of the Law Reports. A. H. F. L.

SELECTIONS.

FENCE LAW.

At common law in England, no one was obliged to fence his land, except by force of prescription or contract. A person owning cattle must keep them on his own land at his peril, and is liable for damages caused by them if they escape; but he may confine them in any way he chooses. No one need take any precautions to prevent cattle from an adjoining close from trespassing on his own land. The want of a fence is no objection to recovery for damages done by animals, except as it is made so by statute, contract or usage.[1] This doctrine of the common law of England is recognized as the common law of Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Indiana, Kentucky, Michigan, Minnesota, and perhaps some other States.[2] In several States this rule of the common law is not in force, and the owner of cattle is not obliged to confine them to his own property, but the occupant of land must, at his own peril, keep them out. This is the rule in Ohio, California, North Carolina, South Carolina, Georgia, Missouri, Mississippi, Texas, and Colorado.[3] In these States, if he does not properly fence his land, the owner can not recover for damages done his property by his neighbour's cattle, but is himself liable to the owner of cattle for any injury they may receive on his premises, the same as if they entered with his permission. In Pennsylvania, Iowa, and Illinois, a rule midway between these two has been established. It is no trespass for cattle to enter on any unfenced lands; but the owner can not recover damages for injuries to his cattle caused by straying on another's land.[4]

The reason for not adopting the common law rule in many of our States are well given in the case of *Seely* v. *Peters*.[5] In this case the court says:—"However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If the common law prevails now, it must have prevailed from the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, they brought with them, and adopted as applicable to their condition, a rule of law requiring every one to fence up his cattle? That they designed the millions of fertile acres stretched out before them to grow ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the Eastern States in their early settlement; because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth, sufficient for thousands of cattle, must be suffered to decay where it grows, unless settlers upon their borders can be permitted to turn their cattle upon them." In accordance with this reasoning, we find that, as a rule, with several exceptions, however, in the newer States and Territories, and those adapted for grazing, either by the decisions of the courts or by statutes, cattle are allowed to range at will, and those cultivating the ground must fence their possessions to keep them out.[6] In Utah, while, by the general law owners of cattle are liable for damages for trespassing on another's land, whether fenced or not, yet the inhabitants of any district may, by vote, allow cattle to range at large, and require owners of cultivated fields to fence them up.[7] In most of the States the subject is regulated by statute.

In nearly all the States statutes have been passed concerning the building and maintenance of division fences on the boundary line between adjoining proprietors, and providing generally, that when the owners of the two estates can not agree, application may be made to fence viewers, who shall decide the disputed questions. These statutes generally provide what shall be considered a sufficient and lawful fence.

The object of fencing is to provide against damage caused by or to domestic animals properly restrainable by a common fence. One is not obliged to fence against such small animals as would pass through or under an ordinary fence, nor against such wild animals as would break through. If an animal breaks

1. 20 Edw., IV. 10.
2. *Harlow* v. *Stinson*, 60 Me. 347; *Lyon* v. *Merrice*, 105 Mass. 71.
3. *Cleveland, etc. R. Co.* v. *Elliott*, 4 Ohio St. 474; *Comiford* v. *Dupuy*, 17 Cal. 308.
4. *North Penn. R. Co.* v. *Rehaman*, 49 Pa. St. 101; *Wagner* v. *Bissell*, 3 Iowa 396; *Stoner* v. *Shugart*, 45 Ill. 76.
5. *Seely* v. *Peters*, 5 Gilw. (Ill.) 130.
6. Colorado, *Morris* v. *Fraker*, 5 Colo. 425; Montana, Code Sts. 373, sect. 1; Nebraska, Comp. Sts. 49, sects. 19, 21; Washington Territory, Code, sect. 2590; Nevada, Comp. Laws, 3992, 3994.
7. Comp. Laws, chap. 3, sects. 1, 2.

through a sufficient fence, and trepasses on another's land, the owner is liable for the damage done by it,[8] and can not recover for any injury suffered by the animal in consequence of such trespass.[9] It was held in Missouri, that when a wild buffalo bull breaks into a close, the owner of the premises may kill him if necessary to protect his property from destruction, although the land was not fenced in the manner required by statute.[10] It is, however, ordinarily not lawful to kill animals trespassing on one's own land.[11] The owners of uninclosed land may drive off trespassing cattle into the highway, and are not liable for injuries they may afterwards receive.[12] The owners of cats or dogs can not at common law be held responsible for trespasses committed by them.[13]

The obligation to fence applies only in favour of animals lawfully on the adjoining lands. Therefore, if an animal trespassing on the land of another, breaks through a defective fence from such land onto the premises of a third person, the owner can not recover damages from such third person, although he is bound to keep the fence in repair.[14] The public have no rights in a highway, except the right to pass and repass thereon. Therefore, cattle left to graze on the highway are not lawfully there; and if they escape through a defective fence onto adjoining lands, their owner cannot recover for damages received by them: nor can he avail himself of the defect in the fence in an action brought against him by the owner of the land for damages sustained by him.[15]

A person who is legally bound to maintain a fence, can not recover damages caused by its defect. Where two persons own adjoining lands, separated by a division fence, one part of which one owner is bound to repair, and the remainder the other is to maintain, neither party can recover damages occasioned by reason of a defect in his own part of the fence, but may collect for damages occasioned by cattle breaking through his neighbor's part, although his own is equally defective.[16] If no particular part of the division fence belongs to either party to maintain, in Maine and Connecticut, no damages can be recovered on account of trespass by reason of defect or absence of a fence.[17] In other States, however, either party could recover, under the common law rule, that owners of cattle must in some way keep them at home or be responsible for damage caused by them.[18]

An agreement to maintain a fence on a boundary line is irrevocable, except by mutual consent, or in some manner provided by statute.[19] A covenant in a deed of lands, to maintain a fence between the granted premises and the remaining land of the grantor, runs with the land, and is an incumberance on the grantor's land.[20] A person who is bound to erect a division fence, may build half of it on the land of the adjoining owner,[21] and he has also a right to enter upon his neighbour's land if necessary to erect such fence, and to remove materials and tools used in building.[22] In England, however, it seems that a person building a division fence must build it entirely on his own land.[23] A fence when erected is part of the freehold.[24] Therefore if a man build a fence on his neighbour's land, it becomes the property of the owner of the land on which it was built. But it has been held that if a fence intended to make a division line is by mistake erected on another line, it may be removed to the true boundary within a reasonable time after the mistake is discovered.[25] This is also generally provided for by statute.

The law concerning railroad fences does not materially differ from that of ordinary fences except as it is changed by statute. At common law, a railroad company, like any other owner of land, is not obliged to fence. Therefore, when the common law rule is in force, an owner of cattle injured while trespassing upon a railroad track, can not recover without proof of negligence on the part of the company.[26] In most of the States, railroads are obliged by statute to fence their land. In England, and in Vermont, New Hampshire, and Massachusetts, the benefit of these statutes is confied to the owners of animals lawfully on the adjoining land, and a railroad

8. *Rice* v. *Nagie*, 14 Kan. 499.
9. *Morrison* v. *Comelius*, 63 N. C. 346.
10. *Canefox* v. *Crenshaw*, 24 Mo. 199.
11. *Clare* v. *Kiliher*, 107 Mass. 406; *Johnson* v. *Patterson*, 24 Conn. 1.
12. *Humphrey* v. *Douglass*, 11 Vt. 22.
13. *Blair* v. *Forehend*, 100 Mass. 140.
14. *Lawreuce* v. *Coombs*, 31 N. H. 331.
15. *Stackpele* v. *Hoaly*, 16 Mass. 33; *Holliday* v. *Marsh*, 3 Wend. 141.
16. *Shepperd* v. *Hoes*, 12 Johns, 433.
17. *Gonch* v. *Stephenson*, 13 Me. 371; *Studwell* v. *Rich*, 14 Conn. 292.
18. *Thaver* v. *Arnold*, 4 Met. 589; *Lohnyon* v. *Voing*, 3 Mich. 163.
19. *York* v. *Davis*, 11 N. H. 241.
20. *Bronson* v. *Coffin*, 108 Mass. 175.
21. *Newell* v. *Hill*, 2 Met. 18c.
22. *Carpenter* v. *Harsay*, 57 N. Y. 657.
23. *Vowles* v. *Miller*, 3 Taunt. 138.
24. *Brown* v. *Budges*, 31 Iowa 138.
25. *Martin* v. *Calhoun*, 44 Mo. 368.
26. *Housatonic Ry. Co.* v. *Knowles*, 30 Conn. 313.

company is not liable to others, unless the injury resulted from the willful or negligent acts of the company or its servants.[27] In most States, however, the benefit of the statutes is extended to all owners of animals. Although fences and cattle-guards have been erected, and are maintained as required by law, yet the company is liable for its negligence and wilful acts, subject to the same rules as other parties guilty of negligence.[28]

It has been stated that contributory negligence on the part of the plaintiff, is no defence in an action against a railroad company for injury to animals; the want of a proper fence being proved. This probably means that a person is not obliged to forego the use of his land in consequence of the neglect to fence on the part of the company, and the owner may recover if he turns his animals into his field, although he knows it is unfenced and they are liable to be injured.[29] A person who wilfully turns his cattle on a railroad track, can not recover for their injury.[30] If the owner of land adjoining a railroad carelessly leaves a gate open through which his cattle stray out onto the track, the company is not liable.[31] When a proper fence has been erected along the road, it is the duty of the adjoining proprietors to notify the company of a defect in the fence, when they know of such defect. If they fail to do so they cannot recover for injuries received by reason of such defect, unless it was known by some agent of the road whose duty it was to communicate notice of it to the officer having charge of such matters.—*Central Law Journal.*

27. *Eames* v. *Salem & Lowell Ry. Co.*, 98 Mass. 560.
28. *Illinois Central Ry. Co.* v. *Middlesworth*, 46 Ill. 495.
29. *Shepard* v. *Buffalo, etc. Ry. Co.*, 35 N. Y. 641.
30. *Corwin* v. *N. Y. etc. Erie Ry. Co.*, 13 N. Y. 42.
31. *Indianapolis Ry. Co.* v. *Shiner*, 17 Ind. 295.
32. *Poler* v. *N. Y. C. Ry. Co.*, 16 N. Y. 476.

REPORTS

RECENT ENGLISH PRACTICE CASES.

ATTORNEY-GENERAL V. EMERSON.

Imp. O. 31, r. 13—Ont. r. 228—Discovery—Affidavit on production.

The Court will not accept the statement of a defendant in his affidavit on production that certain documents, which are in his possession and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plaintiff's case or impeach the defence, but will order such documents to be produced, if, from the whole of the defendant's answer or from the description of the documents given by the defendant, the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents.

[C. A.—L. R. 10 Q. B. D. 191.

Per BRETT, L.J.—"The rule which we are laying down is, no doubt, the rule which was applicable to the former proceedings in the Court of Chancery, but it seems to me that it is equally applicable to the affidavit which claims protection from the production of documents under the orders and rules of the Judicature Act."

Per LINDLEY, L. J.—"I am of the same opinion."

[NOTE.—*With this case compare Ponsonby* v. *Hartley, W. N. 83, p. 13; S. C. in App. ib. p. 44.*

RAYMOND V. TAPSON.

Imp. O. 37, r. 4—Ont. Rule 285—Witnesses—Evidence.

[C. A.—L. R. 22 Ch. D. 430.

This rule must not be read as restrictive, as though it had abolished (although it does not refer to it) the old practice as to subpœnaing witnesses without the leave of any court. It plainly was intended to be an enabling clause to provide for the taking of evidence in cases where the ordinary practice did not provide for it, and it gave the court power to take evidence, and the examiner to take evidence *de bene esse* when, for the moment, the cause was not at issue, and you wanted evidence for the hearing and in like cases.

HARRIS V. JENKINS.

Imp. O. 27, r. 1—Ont. Rule 178—Pleading—Embarrassing statement of claim.

In an action to restrain the obstruction of an alleged private right of way, the plaintiff ought to show in his statement of claim whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the *termini* of the way and its course. If the plaintiff omits to do this his statement of claim is embarrassing, and the Court will order it to be amended.

[L. R. 22 Ch. D. 481.

FRY, J.—"Otherwise the defendant might be seriously embarrassed. He might come to the trial with witnesses prepared to prove that the

user of the way had been for less than the legal period of prescription, that it had been a user *clam*, or by permission, and then he might find that the plaintiff claimed the right under a grant. I think the defendant is entitled to a short statement by the plaintiff, of the title by which he claims. The right is a legal conclusion from certain facts, and those facts ought to be shortly stated in the pleading."

COOKE V. THE NEWCASTLE, ETC., WATER CO.

Imp. J. A. 1873, ss. 57, 58; O. 39, r. 1, 136, r. 34—Ont. J. A. ss. 48, 49, Rules 307, 281—Referee—Report to judge—Application to set aside.

Application to set aside the findings of a referee appointed under the former of the above sections to try the issues of fact in an action, and report to the judge making the reference, must be made to a Divisional Court and not to the judge ordering the reference, as such findings are, by the latter of the above sections, equivalent to the verdict of a jury, and can only be set aside by the Court. Ont. Rule 281 confers no such power upon the judge ordering the reference.

Quære, whether the time for making the application runs from the time when the report is made to the judge.

[L. R. 10 Q. B. D. 332.

FRY, J.—"The report of the referee stands, in my opinion, precisely upon the same footing (as the verdict of a jury). It is in truth merely his written verdict upon the facts referred to him for trial, and is by no means to be looked upon as a report to be adopted or not according to the views of the judge before whom the case is in course of trial."

As to the time for moving to set aside the findings:—

FRY, J. [after referring to *Sullivan* v. *Revington*, 28 W. R. 372, see Maclennan's J. A. p. 263.] "In the case of a verdict, the time for moving against it ordinarily begins to run from the day on which the verdict is delivered. But in the case where the referee is to report his finding to the judge, it would at least seem reasonable that the time should not begin to run until the day on which the report is so made; for until then the referee cannot be said to have finally and irrevocably exercised his jurisdiction; up to that time he may reconsider the evidence as much and as often as he sees fit. It is only the report to the judges which is equivalent to a verdict, and it stands to reason that no motion can be made to set it aside until the report has been made."

As to what may be urged why judgment should not be given on further consideration after report:—

FRY, J.—"Should I be of opinion that the referee has exceeded his jurisdiction, either in his findings or in any other respect, I shall reject all such unwarranted findings and conclusions, and treat them as though they had never been embodied in the report at all. Such objections as that the report is imperfect, or that it is in excess of jurisdiction, may clearly be urged on the hearing on further consideration as grounds why judgment should not be given for the plaintiff who is applying for it: see *In re Brook, Sykes* v. *Brook*, 50 L. J. (Ch.) 744."

IN RE NEW CALLAO.

Imp. O. 58, rr. 3, 15—Ont. J. A. s. 38—Informal notice of appeal.

[L. R. 22 Ch. Div. 484.

A petition for winding up a company having been dismissed, the petitioner's solicitors wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till the time allowed had elapsed, when the petitioner gave a supplemental notice of appeal.

Held, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late.

DAWSON V. BEESON.

Imp. O. 53, r. 4, O. 59, r. 1—Ont. Rules 407, 473—Short notice of motion—Power of court to disregard irregularities.

Where a party applies for a special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the Court exercised its discretion under Imp. O. 55, r. 1, (Ont. Rule 473), and disregarded the irregularity and heard the motion on the merits.

[C. A.—L. R. 22 Ch. D. 504.

Per JESSEL, M.R.—"Nothing can be more distinct and valuable than the first rule of O. 59,

(Ont. Rule 473), which enables the Court to do justice without regard to technicalities."

JOY V. HADLEY.

Imp. O. 31, r. 21—Ont. Rule 237—Order for discovery—Service—Attachment.

[L. R. 22 Ch. D.

In an action for the specific performance of an agreement by the defendant to sell two leasehold houses to the plaintiff, judgment for specific performance was given, and an order was afterwards made that the defendant should, within four days after service of the order, produce to the plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power," relating to the property.

Held, under the above rule, service of this order on the defendant's solicitors was sufficient service to found an application to attach the defendant for disobedience of the order.

NICHOLS V. EVANS.

Imp O. 30, rr. 1, 4, O. 55, r. 1—Ont. Rules 215, 218, 428—Payment into court in satisfaction—Costs.

Imp. O. 30 (Ont. O. 26), applies only to an action which is strictly brought to recover a debt or damages. If an account is claimed the order does not apply, and, even if the plaintiff accepts in satisfaction of his whole cause of action a sum paid into Court by the defendant, the Court has a discretion as to the costs.

[L. R. 22, Ch. D.

FRY, J.—"In my judgment the order applies, as is shown by Rule 1, only to a case in which the plaintiff is strictly seeking to recover a debt or damages, where the whole demand applies to money. If the plaintiff seeks an account it is impossible to satisfy that demand by any specific payment of money. I think, therefore, that the Court has, in the present case, a discretion as to the costs."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.]

PERE ADAMS V. THE CORPORATION OF THE TOWNSHIP OF EAST WHITBY.

Closing travelled road—Other convenient access to lands—Onus of proof—Dedication.

The power of a municipal council to close up a road under sect. 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only; and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed.

The *onus* of showing that another convenient road is open to the applicant, is upon the corporation.

The corporation of East Whitby, by by-law, closed up an old travelled road whereby the applicant was shut out from ingress to his lands, except by a short road leading to the original road allowance which was now for the first time opened. For some years prior to 1844, the short road was used as a private road, for the convenience of persons going to one F.'s place, mills, brewery and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention was made of it in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road was closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed.

Held, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof, sufficiently showed the intention to dedicate the short road to the public; that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstance, without costs.

CHANCERY DIVISION.

Proudfoot, J.] [May 22.

JENKINS v. THE CENTRAL ONTARIO RY.

General Railway Act—Compulsory purchase—Mines—R. S. O. c. 165, s. 20, subs. 23.

Motion for injunction. Where the Special Act of a certain railway incorporated the claims of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the ores obtained *along their line of railway*, to manufacture iron and steel for their own use, and also gave them power to *acquire mining properties by purchase;* and where the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land.

Held, the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs; for the legislature had not seen fit to impose any limitations on the right of the company in locating their line, where there were mines, by giving only a right of way over the surface or otherwise, but had left the expropriation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land.

Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers of compulsorily acquiring it were given, but for some collateral object, as, for example, with the object of afterwards selling it to a third party.

Semble, should it afterwards appear that such a scheme was actually in contemplation, and hereafter carried out, means might probably be found to prevent it.

Semble also, the powers conferred on the County Judge under the Railway Act of Ontario, R. S. O. c. 165, sect. 20, subs. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this Court to enjoin the taking of possession, if the railway company is making use of their powers to attaln any object collateral to that for which it was incorporated; but if it is not proved that the company is exercising its powers for an unauthorized object, it is not within the jurisdiction of a judge of this Court to interfere with an order for immediate possession granted by a County Judge, though granted *ex parte*.

C. Moss, Q.C., for the plaintiffs.

——— for the defendants.

PRACTICE CASES.

Cameron, J.] [October, 1882.

ONTARIO & QUEBEC RAILWAY CO. v. GRAND TRUNK RAILWAY CO.

Railway Company—Construction of line—Powers under act of incorporation.

Upon an application for the appointment of arbitrators to determine the compensation to be paid by the O. & Q. Ry. Co. for crossing the railway of the G. T. Ry. Co. at a point near the Carlton station of the latter company, it was objected by the G. T. Ry. Co. that the O. & Q. Ry. Co are only authorized by their Act of incorporation to build or construct their railway eastward from the City of Toronto, that the Carlton station of the G. T. Ry. is about three miles north-west of the City of Toronto, that the O. & Q. Ry. Co. have not determined the point in Toronto where the western terminus of the railway shall be, and untill that is done the company cannot exercise a right of crossing the G. T. Ry. with a view to uniting its line with the C. V. Ry., which is what it contemplates doing.

Held, that there can be no valid objection to the O. & Q. Ry. connecting their line at any point on the C. V. Ry. within the County of York, with the C. V. Ry. without reaching or touching directly the City of Toronto except through such connection.

H. Cameron, Q.C., and *G. T. Blackstock*, for the O. & Q. Ry. Co.

W. Cassels and *C. A. Brough*, for the G. T. Ry. Co.

Cameron, J.] [Jan. 31.

BLAINEY v. MCGRATH.

Partnership—Costs—R. S. O. ch. 15.

The plaintiff and defendant entered into a partnership to furnish G. and H. with certain staves for the price of $2,000. The contract was not

fulfilled and the plaintiff subsequently brought an action, and obtained a reference to take an account of the partnership dealings. The report found *inter alia* that the plaintiff had contributed to the partnership capital $87.39, and the defendant $233.89, and that there was due from the defendant to the plaintiff $43.74.

The taxing officer taxed the plaintiffs costs under the lower scale on the ground that the case came within Con. Stat. ch. 15, sect. 34, sub-sec. 1.

On appeal CAMERON, J., reversed the taxing officer's ruling.

Nelson, for the plaintiff (appellant).

McMichael, *Hoskin* and *Ogden*, contra.

Mr. Winchester.] [May 3.

BEATTY v. CROMWELL.

Action on foreign judgment—Jurisdiction of foreign court.

An action on a foreign judgment obtained in the State of Massachusetts, U. S. A.

3rd defence.—That the defendant was not, at the commencement of the action or at any time previous to the judgment, resident or domiciled within the jurisdiction of the said Court, or within the jurisdiction of the U. S. A., or a subject of the U. S. A., that the defendant was not served with a process in the action, nor did he appear, nor had he before the recovery of the judgment any notice or knowledge of any process, nor had he any opportunity of defending himself.

The 4th defence was a defence to the original cause of action.

The defendant, in his examination, admitted that he had heard of some claim being made by the plaintiff on which judgment was obtained, (through his brother, who lived in the United States, writing to him about it), and that he wrote to his brother if there was any necessity to employ some one who knew more about it than he did, and that he thought his brother wrote to him informing him that he had got some one to attend to it, and that he sent a statement of the matter to his brother as set forth in the defence put in by Stetson and Green, lawyers. He stated that he was never served with any notice of the action having been brought in any way whatever, and never heard of the trial being about to take place, and never dreamt or heard of it till after judgment had been entered against him; that he has been living in Canada for the last six years, and out of nineteen years previous to that he only spent a year and a half in the United States. He also admitted that a portion of his estate in Mass. had been attached to pay the judgment.

A. Cassels, for the plaintiff, moved to strike out the 3rd and 4th defences on the ground that the 3rd defence is, in its material parts, bad, and that both are embarrassing.

Shepley shewed cause.

Motion refused following *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, and *Fowler* v. *Vail*, 27 C. P. 417, and 4 App. 267.

Mr. Dalton, Q.C.] [May 15

MCCREADY v. HENNESSY.

Security for costs—Costs of application for.

An action for goods sold and delivered. Security for costs was ordered on the ground that the plaintiff's residence was out of jurisdiction; although the writ of summons did not state the plaintiff's residence, it was admitted, on the return of the motion, that he lived in Montreal.

The costs of the defendant's application for security were ordered to be costs to the defendant in the cause, the Master holding that it is necessary to endorse the plaintiff's residence on the writ when he is out of the jurisdiction. If the plaintiff's residence had been so endorsed an order would have issued on præcipe, of which the plaintiff would have had no costs, so neither can he have any costs of this motion, as might be the case if costs of this application were made costs in the cause generally.

Clement, for defendant.

Aylesworth, for plaintiff.

Mr. Dalton, Q.C.] [May 17.

KEMPT v. MACAULAY.

Mortgage—Assignment—Costs—Contribution.

An action for foreclosure of a mortgage. After judgment the defendant V., the owner of the equity of redemption, paid principal, interest, and costs, and took an assignment of the judgment and mortgage.

A writ of *fi. fa.* was issued, endorsed to levy one-half the costs from V.'s co-defendant M., the mortgagor,

Held, that V. having, by means of the assignment, released his own estate from the charge upon it, had no remedy against any one for the money he had paid except against one E. who, in assigning to him the equity of redemption, covenanted against encumbrances.

Shepley, for the motion.

Watson, contra.

Mr. Dalton, Q. C.] [May 26.

WESTERN CANADA L. AND S. CO. v. DUNN.

Ejectment—Infant defendant—Sale of lands

The chancery rule by which defendants, in an action for foreclosure of a mortgage, may obtain a sale instead of a foreclosure, will not, even when the defendants are infants, be extended to actions of ejectment.

Lefroy, for the plaintiffs.

Clement, for the official guardian representing the infant defendants.

Mr. Dalton, Q. C.] May 30.

BOYD v. MCNUTT.

Erasures and interlineations in affidavits—Rule 468 O. J. A.

Upon a motion for leave to sign final judgment under Rule 80 O. J A. objection was taken by the defendant to the affidavit upon which the motion was based, on the ground that in the clause that the plaintiff was informed and believed that an appearance had been entered for the defendant—the word "defence" had originally stood instead of "appearance," that the former word had been erased and the latter interlined above it, and that such erasure and interlineation had not been initialed by the commissioner before whom the affidavit was sworn.

The Master in Chambers *held*, under Rule 468 O. J. A., that the affidavit could not be read, but enlarged the application for two days, giving the plaintiff leave to withdraw the affidavit from the files, and to re-file it when re-sworn.

Aylesworth, for the plaintiff.

H. J. Scott, for the defendant.

Mr. Dalton, Q. C.] [June 1.

O'BRIEN v. BULL.

Interpleader—Final order—Sheriff's costs.

The claimant having succeeded in the trial of an interpleader issue, moved for a final order, barring the execution creditors, and served notice of the motion upon the sheriff. The sheriff appeared upon the motion and asked for costs. An order was made for the claimant to pay the sheriff's costs of the motion without recourse over to the execution creditors.

Held, that it was unnecessary to serve the sheriff with notice of this motion.

D. E. Thomson, for the claimant.

Aylesworth, for the execution creditors.

Clement, for the sheriff.

Armour, J.] [June 1.

GREAT WESTERN ADVERTISING CO. v. RAINER.

Jurisdiction—Setting off costs.

This was an action in the County Court of the County of Middlesex, to recover the price of work done for the defendant in advertising. The case was tried before the County Judge, without a jury, and judgment was rendered for $36, no order being made as to costs.

Aylesworth, for the plaintiffs, moved for a mandamus to compel the County Court Clerk to enter up judgment for the plaintiffs without any set off.

J. H. Macdonald, for the defendant, claimed that his client should be allowed to set off the costs incurred by him in the County Court, as according to the amount of the judgment the action should have been brought in the Division Court.

ARMOUR, J., *held*, that costs being in the discretion of the judge, and not having been disposed of at the trial, none can be awarded to either party, and there can be no set off.

Mandamus granted for the County Court Clerk to enter judgment for the plaintiff without costs.

Osler, J.] [May 25.

DICKSON v. MURRAY.

Controverted Election Act of Ontario—Particulars—Within what time to be delivered.

This was an election petition respecting the election for the electoral district of the North Riding of the County of Renfrew, holden in February, 1883.

In making an order for particulars, on the application of the respondent, OSLER, J., on May 25, 1883, endorsed the following ruling as to the practice on the draft order: "I think the English

practice as to the time ought to be followed, at all events more nearly than by limiting the party to fourteen days on which to deliver the particulars. The settled English practice is seven clear days, and eight clear days seems to me, making every allowance for distance, means of communication, etc., to be ample ; in some case it may be needlessly long, but as a general rule I should say it was sufficient. I refer to the *Hereford case*, *Lenham* v. *Patterson*, 10 Q. B. 293 ; *Maude* v. *Lowley*, 9 C. P. 165 ; *Beale* v. *Smith*, L. R. 4 C. P. 145."

The order as finally settled by the learned judge was as follows :—

"It is ordered that the petitioner do, eight clear days before the day appointed for the trial of the petition herein, deliver to the respondent or his agent full particulars in writing, containing, as far as known to the petitioner,

1. The names, places of abode, and occupations of all persons upon whom or with whom the respondent practiced or committed any of the corrupt or illegal acts or practices charged in the petition, together with the nature of such acts or practices, and the times when, or approximate times when, if the exact time be not known, and places where such acts or practices were done or committed.

2. The names, places of abode, and occupations of all persons claimed to be agents of the respondent, who were guilty of any of the corrupt or illegal acts or practices alleged in the petition, together with the nature of each of the said acts or practices, and the times when, or approximate times when, if the exact time be not known, and places where such acts or practices were done or committed.

3 The names, places of abode, and occupations of all other persons who, on behalf of the respondent, are alleged to have been guilty of any of the corrupt or illegal acts oa practices charged in the petition, and the nature of each of such acts or practices, together with the times when, or approximate times when, if the exact times be not known, and places where such acts or practices were done or committed.

4. The names, places of abode, and occupations of all persons upon whom, with whom, or between whom such corrupt or illegal acts or practices were done or committed, and the nature of each of such acts or practices, together with the times when, or approximate times when, if the exact times be not known, and places where such acts or practices were done or committed.

5. And it is further ordered that unless an order be made to the contrary, no evidence shall be received at the trial except as to matters within the said particulars and tending to support the same without the leave of the court or a judge, and upon such conditions as to the postponement of the trial, payment of costs or otherwise as may be ordered.

6. And it is further ordered that the costs of and incidental to this application and order, and consequent thereupon, shall be costs in the cause to the successful party.

Cameron, J.] [June 6.

MORRISON V. TAYLOR.

Sheriff—Fees—Poundage—Rule 447 O. J. A.—R. S. O. ch. 66.

An execution, and the judgment under which it issued, were set aside on the ground of irregularity in obtaining the judgment.

Held, that the plaintiff was not entitled to have the sheriff's bill against him taxed under sect. 48 R. S. O. ch. 65, as the setting aside of the execution was not a "settlement by payment, levy, or otherwise," within the meaning of the Act or under sect. 47, as the plaintiff was not a person liable on any execution.

Held, however, that a sheriff, as an officer of the Court, claiming fees by virtue of the process, is so far within its jurisdiction that his bill may be taxed under Rule 447, but the appeal as to certain items was dismissed because notice in writing of the items disputed was not given under Rule 449.

Held also, that this case came within the provisions of sect. 45, R. S. O. ch. 66, and that therefore the sheriff was entitled to poundage.

Caswell, for the motion.

Holman, contra.

LAW STUDENT'S DEPARTMENT.

THE LAW SCHOOL.

The Benchers have re-established the Law School for another year. Whilst we have taken strong ground in favour of the school from time to time, and think that even though the number who take advantage of it is comparatively small, it should be kept up, we would warn the students that its continuance may in the future depend on the way they may show their appreciation of it by their attendance this year. We trust therefore that the numbers may increase.

It is not out of place here to suggest that an occasional lecture at stated periods by some of the older men at the Bar whose experience would enable them to do it with facility and advantage, on some interesting subject connected with the profession, not strictly in the line of dry learning, would be very acceptable and increase the popularity of the school. The students gladly acknowledge the services of some few who have thus given help and countenance to the school and benefitted the students. If some of the leaders at the Bar would hand over a brief once a month or so to a junior, and devote a couple of hours to some such work as this, the very small sacrifice entailed would be of great use to the students, and help towards paying a debt which we conceive they owe to the profession at large.

The examiners appointed are Messrs. Delamere, Armour, Marsh, and W. A. Reeve.

EXAMINATION QUESTIONS.

EASTER TERM, 1883.

SECOND INTERMEDIATE—HONORS.

Equity Jurisprudence.

1. Explain the jurisdiction of Equity to relieve against accident, and illustrate the application of that jurisdiction in cases of (1) lost documents; (2) imperfect execution of powers; and (3) erroneous payments.

2. Explain the jurisdiction of Equity in (1) marshalling of assets, and (2) marshalling of securities.

3. Under what circumstances will a purchaser of real estate (1) be, or (2) be not, bound to see to the application of the purchase money of the real estate purchased by him?

4. Define "Conversion" and "Reconversion," and give illustrations of each.

5. On what grounds will Equity exercise a jurisdiction to rectify a contract?

6. What is meant by "a wife's equity to a settlement?" and shew how the Court deals with such equity in respect of the wife's (1) real and (2) personal estate.

7. Show the maxim "Equity follows the law," in cases arising under (1) the concurrent, and (2) the exclusive, jurisdiction of Courts of Equity.

Broom's Common Law.

1. Explain fully and illustrate the principle that an agreement to oust the Court of Jurisdiction is void? Is there any qualification to this doctrine?

2. Give some instances of *damnum sine injuria.* Define *damnum* and *injuria.*

3. Define the following classes of contracts (1) executed, (2) executory, (3) express, (4) implied.

4. What is meant by mutuality in a contract? Does it always mean mutuality of obligation? Explain.

5. The law, where a contract is executed, requires that a request express or implied should be shewn. In what cases will the request be implied?

6. How far is intoxication of the contracting party a defence to an action brought upon the contract?

7. Define malice in criminal law?

CORRESPONDENCE.

The Judges of the Q. B. Division and the Court of Chancery.

To the Editor of the LAW JOURNAL.

SIR,—It must be apparent to every one attending the sittings of the Divisional Court of Queen's Bench, and also the sittings of single judges of that division, that there appears to be some extraordinary and most unreasonable antipathy existing in the breasts of some at least of the learned judges of that division, at anything and everything savouring of equity jurisdiction and equity principles of procedure. This antipathy vents itself in frequent sneers, sometimes jocular and sometimes ill natured, at the methods and principles against which they entertain such strong prejudices; and even their learned brethren of the Chancery Division do not escape covert censure for their mode of transacting business. This, besides being very un-

dignified, and laying the learned judges, who indulge in such foolish displays, open to ridicule and loss of respect, is besides very questionable taste as a matter of mere politeness towards their brethren, and calculated not only to diminish good feeling amongst themselves, but also to lessen in the public respect for the court and its administration, which all judges are deeply interested in maintaining at a high standard. But such carping and cavillings at equity principles and procedure, when directed against the Chancery Division or any of the judges of that division, might just as well be directed against the learned judges of the Queen's Bench Division themselves, since those learned judges are bound by the same rules of procedure or by the same principles of decision as the judges of the Chancery Division. Adverse comments respecting the judges of the Queen's Bench and Common Pleas Divisions are never heard in the Chancery Division; the judges of that division, I presume, having so much more business to transact than the judges of the other divisions, have no time to waste in making sneering or jocular remarks at the expense of their brethren of the other divisions. Perhaps a little more work would be the most wholesome corrective of these ebullitions in the Queen's Bench Division. Apart from the matter I have alluded to, it may not be out of place, with all due respect, to suggest that more work would be done if some of the learned judges were occasionally to let the Bar do more of the talking. Again, the court is a very strong one, and can afford to be merciful, so far as the Bar is concerned, but one at least of its members sometimes makes it hard for counsel to refrain from retorting in a manner which would be more forcible than polite.

Yours truly,

WEST WING.

Toronto, May 31, 1883.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Stolen negotiable instruments—*London L. J.*, March 24.

Betting through commission agents—*Ib.* April 7.

Discovery in ejectment—*Ib.* May 5.

Damages done by animals during transit through highways—*Irish L. T.* March 31, *et se.*

Torts of married women—*Ib.* April 14, from *Western Jurist.*

Libels imputing insolvency—*Ib.* April 28, from *Justice of the Peace.*

The present condition of legal education—*Law Times.*

Doctrine of *descriptio personæ* as applied to bills and notes—*Central L. J.* May 4.

Has a check holder a right of action against a bank—*Central L. J.* April 6.

Evidence of insanity as a defence to murder—*Ib.* April 13.

When are trustees chargeable with compound interest?—*Ib.*

Illegal contracts—*Ib.* April 20.

A rationale of the law of costs—*Ib.*

The right of a *bona fide* occupant of land to compensation for his improvements — *Ib.* April 27.

Right of a party when his own witness has made previous contradictory statements—*Ib.*

Covenants in leases—Lessor's covenants—*Ib.* May 11.

The burden of proof in life insurances cases—*Ib.*

Some points of international law—Encouragement of foreign insurrection—Right of search—Contraband—*Ib.*

Equities and defences under irregular indorsements—*Ib.* May 25.

Club law, particularly as to rights of expulsion and liabilities of members—*Albany L. J.* April 28.

Jurisdiction over estates of the dead—*Am. Law Review*, March, April.

Marriage and its prohibitions—*Ib.*

Property relations of religious societies—*Ib.*

Priority of demands against decedents' estates—*Ib.*

Warranties implied in sales of personal property in the United States and Canada (continued) —*Am Law Reg.* April.

Extra territorial jurisdiction of receivers—*Ib.* May.

TO OUR READERS.

Please make the following corrections on p. 192 of last number:—

1st col. 10th line from bottom—for "witnesses" read "interest."

2nd col. 9th line from top—for "administer" read "indemnity."

In *Hutton* v. *Federal Bank et al*, at p. 193, after the word "principal" add—

Held, that both branches of the claim must be disallowed.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely:—

William Renwick Riddel, Gold Medalist, with honours; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From 1882 to 1885.	Arithmetic. Euclid, Bb. I., II., and III. English Grammar and Composition. English History Queen Anne to George III. Modern Geography, N. America and Europe. Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cæsar, Bellum Britannicum. Cicero, Pro Archia. Virgil, Æneid, B. V., vv. 1-361. Ovid, Heroides, Epistles, V. XIII.
1884.	Cicero, Cato Major. Virgil, Æneid, B. V., vv. 1-361. Ovid, Fasti, B. I., vv. 1-300. Xenophon, Anabasis, B. II. Homer, Iliad, B. IV.
1885.	Xenophon, Anabasis, B. V. Homer, Iliad, B. IV. Cicero, Cato Major. Virgil, Æneid, B. I., vv. 1-304. Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883 / 1885	Emile de Bonnechose, Lazare Hoche.	1884	Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on :

FIRST INTERMEDIATE.

William's Real Property, Leith's edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills ; Snell's Equity ; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada ; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles ; Taylor's Equity Jurisprudence ; Hawkin's on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers; Best on Evidence ; Byles on Bills ; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows :—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michælmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michælmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

The First Intermediate Examination will begin on the second Tuesday before Term at 9 a.m.

The Second Intermediate Examination will begin on the second Thursday before Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
" Diplomas	2 00
" Certificate of Admission	1 00
All other Certificates	1 00